

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas *As Engrossed: H2/4/03 H2/7/03 H2/17/03 S4/8/03*

2 84th General Assembly

A Bill

3 Regular Session, 2003

HOUSE BILL 1213

4

5 By: Representatives Gillespie, R. Smith, Dees, Agee, Berry, Biggs, Bledsoe, Bolin, Boyd, Cowling,
6 Dickinson, Eason, D. Evans, L. Evans, Gipson, Green, Haak, Hutchinson, Jacobs, Jones, Kenney, Key,
7 Lewellen, Oglesby, Ormond, Pace, Roebuck, Rosenbaum, J. Taylor, Thomas, White, *Borhauer*
8 By: Senators Capps, Baker, Higginbothom, Horn, J. Jeffress, Miller, Steele, Womack, *Wilkins*

9

10

11

For An Act To Be Entitled

12

AN ACT TO PROVIDE A LIABILITY INSURANCE POOL FOR
13 NURSING HOME PATIENTS; TO PROVIDE COURT AND
14 ADMINISTRATIVE PROCEDURES FOR PERSONAL INJURY
15 CLAIMS AGAINST NURSING HOMES; AND FOR OTHER
16 PURPOSES.

17

18

Subtitle

19

AN ACT TO ADDRESS INSURANCE COVERAGE FOR
20 NURSING HOME PATIENTS AND PERSONAL
21 INJURY CLAIMS AGAINST NURSING HOMES.

22

23

24 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

25

26 SECTION 1. Title 20, Subtitle 2, Chapter 10 of the Arkansas Code is
27 amended by adding the following new subchapter 19 to read as follows:

28

20-10-1901. Title.

29

This subchapter shall be referred to as the "Fair Care and Treatment
30 Act of 2003".

31

32

20-10-1902. Purpose and intent.

33

34

The purpose and intent of this act is to provide for the fair care and
35 treatment of persons receiving long-term care in skilled nursing facilities
36 duly licensed to operate in this state. This act authorizes the creation of
a liability insurance pool known as the Patient's Recovery Fund to provide a



1 secure and sustainable source of funds to satisfy personal injury claims by
2 or on behalf of patients of participating facilities. This act provides fair
3 administrative and court procedures for the resolution of disputes between
4 facilities and their patients.

5
6 20-10-1903. Patient's Recovery Fund – Participation.

7 (a) The Patient's Recovery Fund is created for the payment of valid
8 claims and judgments against participating facilities. Each participating
9 facility shall remit monthly assessments to the fund, or make payments to the
10 fund in lieu of assessments, based upon the number of occupied beds as of the
11 first business day of each month. Assessments may be prepaid upon terms
12 approved by the board. Assessments and other payments, together with earned
13 income, surplus and all other moneys accruing to the fund, shall be held in
14 trust by the board for the purposes set forth herein.

15 (b) The fund shall not be deposited or maintained in the state
16 treasury, but shall be a cash fund under the direction and control of the
17 board, as set forth herein. The fund shall not be subject to regulation by
18 the State Insurance Department.

19 (c) Only claims or judgments arising from a wrongful act or acts which
20 occur during a period of participation in the fund shall be covered by the
21 fund. The fund shall offer tail coverage to participating facilities upon
22 terms approved by the board.

23 (d)(1) A skilled nursing facility which is certified to provide
24 services under Title XVIII or Title XIX of the Social Security Act shall
25 participate in and contribute to the fund as a condition of maintaining its
26 license to provide long-term care in this state. A skilled nursing facility
27 which is not certified to provide services under Title XVIII or Title XIX of
28 the Social Security Act, or which receives no reimbursement or other payment
29 under Title XVIII or Title XIX of the Social Security Act for services
30 provided to any of its patients, may elect to participate in the fund, but
31 shall not be required to participate in the fund as a condition of
32 maintaining its license to provide long-term care in this state.

33 (2) Subject to the rules and regulations of the fund and upon
34 terms approved by the board, a skilled nursing facility which is required to
35 participate in the fund as a condition of maintaining its license to provide
36 long-term care in this state may opt out of participation in the fund by

1 giving notice to the administrator that such facility is owned and operated
2 by a nonprofit, government or church affiliated organization as defined by
3 the board. Wrongful acts occurring during such facility's prior period or
4 periods of participation shall be covered.

5 (3) A participating facility shall be dismissed as a participant
6 in the fund for nonpayment of assessments or payments in lieu of assessments,
7 as determined by the rules and regulations of the fund. The board shall
8 provide by regulation for a grace period for curing a default in the payment
9 of assessments or other payments prior to formal dismissal and may impose a
10 late fee not to exceed five dollars (\$5.00) per occupied bed per event of
11 default. Upon dismissal of a facility from the fund, wrongful acts occurring
12 during such facility's prior period or periods of participation shall be
13 covered.

14
15 20-10-1904. Election by participating facility – Initial assessments
16 and payments.

17 (a) A participating facility may elect:

18 (1) To carry a higher deductible, or to retain a higher limit of
19 its risks, by providing evidence satisfactory to the board that it is
20 qualified to fund its risks of loss and that the facility or its affiliate
21 maintains segregated accounts to fund the deductible and self insured
22 retention losses;

23 (2) To purchase commercial insurance coverage by providing proof
24 of such coverage to the board; or

25 (3) To accept the insurance coverage provided by the fund and to
26 pay monthly assessments as provided herein.

27 (b) A participating facility which elects to self insure or to
28 purchase commercial insurance:

29 (1) Shall maintain coverage of not less than two hundred fifty
30 thousand dollars (\$250,000) per claim and an annual aggregate limit of
31 coverage of not less than five hundred thousand dollars (\$500,000);

32 (2) Shall pay an administrative fee to the fund in lieu of
33 monthly assessments, as provided in § 20-10-1904(c); and

34 (3) Shall participate in the fund upon equal terms with other
35 participating facilities; provided, that the fund shall not pay *claims* or
36 judgments on behalf of such facility, unless, and only to the extent that,

1 such facility acquires coverage from the fund.

2 (c) Assessments and payments in lieu of assessments shall be paid from
3 and after January, 2004, based upon the number of occupied beds as of the
4 first business day of such month. The initial amount of the aggregate annual
5 assessment, payable monthly, shall be one thousand dollars (\$1,000) per
6 occupied bed and the initial amount of the annual administrative fee in lieu
7 of assessments shall be two hundred dollars (\$200) per occupied bed.

8
9 20-10-1905. Initial limits of coverage and deductible.

10 With respect to participating facilities which elect to accept the
11 insurance coverage provided by the fund, the initial amount of the per claim
12 limit of coverage shall be two hundred fifty thousand dollars (\$250,000), the
13 initial amount of the annual aggregate limit of coverage per participating
14 facility shall be five hundred thousand dollars (\$500,000), and the initial
15 amount of the deductible shall be ten thousand dollars (\$10,000) per claim.

16
17 20-10-1906. Patient's Recovery Fund Board – Powers and duties.

18 (a) The Patient's Recovery Fund Board shall have four (4) directors
19 and shall consist of a physician, a registered nurse, and a pharmacist, all
20 duly licensed in this state, and a private citizen. The private citizen
21 director, who shall be a non-voting director, shall have training and
22 experience in risk management or in general business management. The
23 Governor shall appoint the private citizen director, who shall be the
24 chairman of the board. The Attorney General shall appoint the physician
25 director, who shall be the vice chairman of the board, from a list of two (2)
26 nominees submitted by the Arkansas Medical Society, or its successor. The
27 President Pro Tempore of the Arkansas Senate shall appoint the nurse
28 director, who shall be the secretary of the board, from a list of two (2)
29 nominees submitted by the Arkansas Nurses Association, or its successor. The
30 Speaker of the Arkansas House of Representatives shall appoint the pharmacist
31 director from a list of two (2) nominees submitted by the Arkansas Health
32 Care Association, or its successor. Nominations shall be submitted to the
33 officials responsible for the appointment of the voting directors on or
34 before July 1, 2003. The initial board shall be appointed on or before
35 August 1, 2003. The initial terms shall be staggered so that the private
36 citizen director and the physician director shall serve for three (3) years,

1 the nurse director shall serve for two (2) years, and the pharmacist director
2 shall serve for one (1) year. Subsequent terms shall be three (3) years.
3 Directors shall be eligible for reappointment.

4 (b) A director may be removed for cause by the Governor upon ten (10)
5 days' written notice to the director. A director whose term expires, or who
6 resigns, is removed, or becomes incapacitated, shall be replaced within
7 forty-five (45) days after the vacancy or expiration of the term by a
8 successor of the same profession or standing, who shall be nominated and
9 appointed as provided in § 20-10-1906(a). If a successor is not appointed
10 within the forty-five day period, the remaining directors shall select an
11 interim director of the same profession or standing who shall serve for the
12 new term or the unexpired portion of the term, as the case may be. Directors
13 whose terms expire shall continue to serve until their successors are
14 appointed.

15 (c) The board shall supervise the management and activities of the
16 fund. Each director shall be compensated from the fund at the rate of one
17 hundred fifty dollars (\$150) per hour devoted to official board activities,
18 not to exceed one thousand five hundred dollars (\$1,500) each month, plus
19 out-of-pocket expenses incurred within the state, documented by appropriate
20 receipts. Directors shall be immune from suit while acting in their official
21 capacities, except for intentional wrongful acts or violation of fiduciary
22 duty.

23 (d) The board shall have the power and discretion, after notice to the
24 affected participating facilities and a hearing, and based upon accepted risk
25 management practices, to determine the amount of the aggregate annual
26 assessment per occupied bed, the amount of the annual administrative fee in
27 lieu of monthly assessments, the amount of the per claim limit of coverage,
28 the amount of the annual aggregate limit of coverage per participating
29 facility, and the amount of the per claim deductible. Notice of a change in
30 the foregoing amounts, or any of them, shall be given to the affected
31 participating facilities not less than sixty (60) days prior to the effective
32 date of the change.

33 (e) The board shall determine terms, conditions and charges for
34 providing tail coverage to participating facilities and shall have the power
35 and discretion to offer supplemental coverage to participating facilities
36 upon terms approved by the board; provided, that supplemental coverage shall

1 be not less than one hundred thousand dollars (\$100,000) per claim.

2 (f) The board shall have the power to enter into contracts, and to sue
3 and be sued, in its own name, to borrow public or private funds in such
4 amounts and upon such terms as may be negotiated with a creditor or
5 creditors, subject to otherwise applicable laws, and to assess an annual
6 surcharge upon the assessments of a participating facility, after notice and
7 a hearing, which demonstrates a disproportionately high history of payable
8 claims or judgments, such surcharge not to exceed four hundred dollars (\$400)
9 per occupied bed.

10 (g) The board shall promulgate rules and regulations to govern the
11 terms and conditions of participation in the fund, the administration of the
12 fund, including the collection, management and disposition of fund assets,
13 and the procedures for the timely resolution of claims before the
14 administrator and the administrative law judges.

15
16 20-10-1907. Administrator – Powers and duties.

17 (a) The board shall employ an administrator of the fund who is a
18 graduate of an accredited four-year college or university with at least ten
19 (10) years experience in the field of risk management or business
20 administration. All qualifications, terms and conditions of employment,
21 including compensation, which shall be paid from the fund, shall be at the
22 sole discretion of the board. The board shall employ the administrator in
23 sufficient time for the administrator to assume the duties of office on or
24 before January 1, 2004.

25 (b) The administrator shall conduct and supervise the business affairs
26 of the fund, pursuant to a written business plan approved by the board, which
27 may include a plan for voluntary mediation of claims. The administrator
28 shall employ appropriate professional personnel to assist with the business
29 affairs of the fund, which shall include a nationally recognized risk
30 management consultant. With board approval, the administrator may purchase
31 or lease appropriate office space, equipment and other necessary assets for
32 the use of the fund, and may expend fund moneys for all other necessary and
33 appropriate purposes, subject to the rules and regulations of the fund.

34 (c) The administrator shall exercise best efforts to locate and
35 approve a list of commercial insurance carriers to offer supplemental
36 insurance coverage in aggregate amounts of up to two million five hundred

1 thousand dollars (\$2,500,000) at negotiable rates.

2
3 20-10-1908. Patient's Recovery Fund Advisory Board.

4 (a) The Patient's Recovery Fund Advisory Board shall have five (5)
5 members and shall consist of the State Insurance Commissioner, the Attorney
6 General, the Director of the Department of Human Services, one (1) director
7 appointed by the *President Pro Tempore* of the Arkansas Senate, and one (1)
8 director appointed by the *Speaker* of the Arkansas House of Representatives.
9 *The directors appointed by the President Pro Tempore of the Arkansas Senate*
10 *and the Speaker of the Arkansas House of Representatives shall serve for*
11 terms of two (2) years and shall be eligible for reappointment.

12 (b) The advisory board shall advise the board and the administrator on
13 the proper execution of the fund and the business plan approved by the board.
14 The advisory board shall meet not less often than semiannually to review and
15 examine financial statements and progress reports, prepared by the
16 administrator and previously reviewed by the board, and to advise the
17 administrator and the board of the sufficiency of the reports. The financial
18 statements shall include a balance sheet and income statement, prepared
19 according to generally accepted accounting principles. The board shall issue
20 an annual financial report prepared and certified by a certified public
21 accountant on the first business day of July of each year, which shall be
22 subject to public inspection.

23
24 20-10-1909. Accumulation of fund assets – Disposition.

25 (a) All moneys held by the fund shall be deposited in banks located
26 within the state or shall be invested in obligations which are permitted
27 investments for the board of trustees of any public employee retirement
28 system of any political subdivision of the state. An accurate inventory of
29 all personal property of the fund shall be maintained at all times.

30 (b) The fund shall be used and expended for the payment and
31 satisfaction of claims and judgments pursuant to this subchapter, for the
32 payment of reasonable fees and expenses incurred by counsel employed by the
33 fund, for the payment of the costs of operation of the fund, including but
34 not limited to compensation, fees and ordinary business expenses, and for no
35 other purposes.

36

1 20-10-1910. Appointment of administrative law judges.

2 The Administrative Office of the Courts shall appoint not less than one
3 (1) administrative law judge, who shall serve for a term of three (3) years,
4 on a full-time or part-time basis, and shall be eligible for reappointment.
5 Administrative law judges shall be licensed attorneys and shall be otherwise
6 qualified as determined by the board. The compensation and expenses of
7 administrative law judges shall be paid by the fund.

8
9 20-10-1911. Definitions.

10 As used in this subchapter:

11 (a) "Action for injury" means any civil action, whether based in tort,
12 contract or otherwise, to recover damages on account of an injury to a
13 patient of any skilled nursing facility.

14 (b) "Affiliate" of a skilled nursing facility means any person or
15 entity controlling, controlled by, or under common control with such
16 facility.

17 (c) "Board" means the Patient's Recovery Fund Board created by this
18 subchapter.

19 (d) "Claim" means a demand for recovery of damages from the Patient's
20 Recovery Fund, whether based in tort, contract or otherwise, on account of an
21 injury to a patient of a participating facility. A claim may be brought by
22 the patient, or by the guardian, representative, executor, administrator, or
23 person acting on behalf of such patient, including a third party whose right
24 to recover damages is derivative of the legal rights of the patient.

25 (e) "Claimant" means the person or persons alleging a claim or action
26 for injury against a skilled nursing facility.

27 (f) "Injury" means the personal injury or death of a patient of a
28 skilled nursing facility arising out of or sustained in the course of the
29 services rendered to the patient by the facility, its owners, principals,
30 officers, employees, agents and affiliates, or any person or entity providing
31 management services to such facility, or arising out of or sustained in the
32 course of the relationship between the patient and the facility, its owners,
33 principals, officers, employees, agents and affiliates, or any person or
34 entity providing management services to such facility.

35 (g) "Occupied beds" means:

36 (1) Beds occupied by patients at midnight;

1 (2) Those beds placed on hold during a period of time not to
2 exceed five (5) consecutive calendar days during which a patient is in a
3 hospital bed; and

4 (3) Those beds placed on hold during a period of time not to
5 exceed fourteen (14) consecutive calendar days during which a patient is on
6 therapeutic home leave.

7 (h) "Participating facility" means a skilled nursing facility which
8 participates in and contributes to the Patient's Recovery Fund, including the
9 owners, principals, officers, employees, agents, and affiliates of such
10 skilled nursing facility. "Participating facility" does not include any
11 unaffiliated person or entity providing management services to such facility.

12 (i) "Patient" means a person receiving care or treatment from a
13 skilled nursing facility.

14 (j) "Skilled nursing facility" means a "long-term care facility" as
15 defined by § 20-10-213(4); provided, that "skilled nursing facility" does not
16 include a residential care facility, post-acute head injury retraining and
17 residential care facility, assisted living facility, or intermediate care
18 facility for the mentally retarded.

19 (k) "Wrongful act" means any act or conduct, whether by commission or
20 omission, which is a proximate cause of an injury.

21
22 20-10-1912. Exclusive remedy – Venue.

23 Notwithstanding any other provision of law:

24 (a) This subchapter provides the exclusive remedy for any action for
25 injury, as defined herein, brought against any skilled nursing facility
26 whatsoever, its owners, principals, officers, employees, agents and
27 affiliates, or any person or entity providing management services to such
28 facility.

29 (b) Any action for injury, as defined herein, shall be brought in the
30 county where the accident occurred which caused the injury or death, or in
31 the county where the person injured or killed resided at the time of injury.
32 Any claim filed against a participating facility prior to the filing of an
33 action for injury shall be dismissed by the administrator without prejudice.

34
35 20-10-1913. Participating facilities – Employment of counsel.

36 Upon request by a participating facility which maintained coverage from

1 the fund for the relevant period, other than a participating facility which
2 maintained commercial insurance coverage for the relevant period, the fund
3 shall employ counsel to defend any action for injury against such facility.
4 Fees and expenses incurred by counsel employed by the fund shall be paid by
5 the fund; provided, that the administrator has the authority to determine the
6 reasonableness of such fees and expenses, subject to the rules and
7 regulations of the fund.

8
9 20-10-1914. Stay – Exhaustion of administrative remedies.

10 (a) After the pleadings have been joined, when it appears from a
11 verified pleading or otherwise that the skilled nursing facility is a
12 participating facility, the circuit court, upon the motion of the parties or
13 its own motion, shall stay all further proceedings in the action and direct
14 that the claimant shall exhaust administrative remedies.

15 (b) The administrative process shall conclude not later than eight (8)
16 months after the filing of the claim with the administrator; provided, that
17 the parties may agree in a writing filed with the administrator for an
18 extension of time not to exceed four (4) additional months. Upon the
19 expiration of the term as provided herein or as agreed by the parties without
20 a settlement or final order, the circuit court may extend the administrative
21 process for a reasonable time or may direct that further proceedings be had
22 in the circuit court.

23 (c) Upon notice that the claim has been approved or settled by the
24 administrator or adjudicated to a final administrative order and that all
25 rights to seek further administrative relief or to appeal from a final
26 administrative order have expired, the circuit court shall enter an order
27 providing that all requests for relief with respect to the action for injury
28 have been satisfied and that the action is dismissed with prejudice.

29
30 20-10-1915. Claims – Authority of administrator.

31 (a) A claim against a participating facility shall be filed with the
32 administrator by the claimant on a form created by the administrator. The
33 claimant shall serve copies of the claim upon the parties. Claims shall be
34 for compensatory damages only and shall not include punitive damages, costs
35 or attorney's fees. Within twenty (20) days from the filing of the claim,
36 the participating facility shall file its response to the claim on a form

1 created by the administrator. When service of the claim is effected by mail
2 or by electronic means, three (3) days shall be added to the time for filing
3 a response. The administrator may provide for the submission of copies of
4 pleadings from the action for injury and the submission of affidavits or
5 other exhibits in support of a claim or defense.

6 (b) The administrator has the sole authority to approve, modify or
7 settle any claim against a participating facility to the extent of the
8 applicable limit of coverage provided by the fund, including the deductible.
9 The administrator is without authority to approve, modify or settle any such
10 claim, or to consent to any award in an amount greater than the applicable
11 limit of coverage provided by the fund, including the deductible.

12
13 20-10-1916. Disposition of claims – Adjudication.

14 (a) The administrator may make such investigation of the claim as the
15 administrator considers necessary, and upon application of any party, or on
16 the administrator's own motion, shall conduct a preliminary conference. The
17 administrator may enter a written order disposing of the claim without
18 adjudication.

19 (b) If the administrator determines that a claim should be
20 adjudicated, or if the claimant or participating facility is dissatisfied
21 with the administrator's disposition of the claim without adjudication, the
22 claim shall be referred to an administrative law judge, who shall
23 expeditiously conduct proceedings to determine the validity of the claim.
24 The fund shall be made a party to such proceeding. A request for
25 adjudication by the claimant or participating facility shall be filed within
26 twenty (20) days from the filing of the administrator's order disposing of
27 the claim without adjudication.

28 (c) The administrative law judge shall conduct an evidentiary hearing
29 on the claim and shall issue a written order within thirty (30) days after
30 such hearing. The administrative law judge has the authority:

31 (1) To hear and determine all claims;

32 (2) To enter orders for the proper conduct of proceedings;

33 (3) To issue subpoenas, administer oaths and take testimony, by
34 deposition or otherwise;

35 (4) To make and enter findings of fact and rulings of law; and

36 (5) To make or modify awards in such amounts as may be supported

1 by the law and the evidence.

2 (d) An order of an administrative law judge granting, modifying or
3 denying a claim shall be supported by findings of fact and conclusions of law
4 and shall be filed with the administrator. Any claim for relief or request
5 for a ruling by the parties which is not disposed of by an express finding of
6 fact or conclusion of law in the order shall be deemed denied.

7
8 20-10-1917. Appeal – Demand for trial by jury.

9 (a) Any party may appeal the order of the administrative law judge to
10 the circuit court where the action for injury is stayed by filing with the
11 administrator, within twenty (20) days from the filing of the order, a notice
12 of appeal. A party shall have twenty (20) days from the filing of a notice
13 of appeal in which to file a notice of cross appeal. A notice of appeal or
14 cross appeal shall designate any necessary transcript of the proceedings,
15 with the cost to be paid by the parties ordering transcripts. A notice of
16 appeal or cross appeal shall be served upon all parties to the claim by
17 certified mail. The administrator shall send to the circuit court all
18 pertinent documents and papers, together with the designated transcript and
19 the orders of the administrative law judge, which shall become the record on
20 appeal.

21 (b) The circuit court shall review the findings and orders of the
22 administrative law judge de novo on the record, in which case the decision of
23 the circuit court shall be final; provided, that any party to the appeal may
24 demand a trial de novo to the circuit court or a trial by jury of any issue
25 triable of right by a jury by filing with the circuit court, within twenty
26 (20) days from the filing of the administrative record transmitted by the
27 administrator, a notice of demand therefor. A demand for trial by jury may
28 be indorsed upon a pleading of the party filed in the circuit court either
29 prior to or subsequent to the filing of the administrative record.

30 (c) The failure of a party to file a demand for a trial de novo to the
31 circuit court or for a jury trial within the time provided in this subchapter
32 constitutes a waiver by the party of such right. A demand for trial by jury
33 may not be withdrawn without the consent of the parties.

34
35 20-10-1918. Payment of claims.

36 (a) With respect to a participating facility which maintained coverage

1 from the fund for the relevant period, a claim that has been approved or
2 settled by the administrator, or a claim that has been adjudicated to a final
3 administrative order or a final judgment of a circuit court, shall be paid as
4 follows:

5 (1) The participating facility shall pay the deductible and the
6 self-insured portion of the award, if any, that were in effect when the claim
7 or action for injury accrued.

8 (2) Provided that commercial insurance coverage is inapplicable,
9 the fund shall pay the balance of the award to the claimant, subject to the
10 per claim limit of coverage and the annual aggregate limit of coverage per
11 participating facility in effect when the claim or action for injury accrued,
12 exclusive of fees and expenses. The fund shall not pay punitive damages or
13 costs and attorney's fees incurred by the claimant.

14 (b)(1) Claims or judgments which become final and unappealable during
15 the first six (6) months of the calendar year shall be paid by the fund on
16 the following August 15. Claims or judgments which become final and
17 unappealable during the last six (6) months of the calendar year shall be
18 paid by the fund on the following February 15.

19 (2) If the balance in the fund is insufficient to pay in full
20 all claims and judgments which have become final and unappealable during a
21 six-month period, the award paid to each claimant shall be prorated. Any
22 amount left unpaid as a result of the proration shall be paid before the
23 payment of claims or judgments which become final and unappealable during any
24 subsequent six-month period.

25 (c) Prejudgment interest shall not be payable on any claim or
26 judgment. Simple interest at the rate of six percent (6%) per annum shall be
27 paid on the unpaid balance of a claim or judgment from and after August 15 or
28 February 15, as the case may be; provided, that in any action for injury that
29 is tried before a jury, postjudgment interest shall be payable as provided by
30 law.

31 (d) With respect to a participating facility which did not maintain
32 coverage from the fund for the relevant period, a claim that has been
33 approved by the administrator, or a claim that has been adjudicated to a
34 final administrative order or a final judgment of a circuit court, shall be
35 paid, and execution may be had thereon, as in judgments at law.

36

1 20-10-1919. Liability of medical director – Immunity.

2 With respect to any action for injury, the medical director of a
3 skilled nursing facility is individually liable only for a wrongful act or
4 acts performed solely as a treating physician of a patient, or for ordinary
5 negligence, or for intentional wrongdoing. The medical director shall not be
6 liable for any other acts or omissions performed within the scope of
7 employment as a medical director. The immunity granted by this section shall
8 not be a defense of the skilled nursing facility and shall not alter existing
9 law with respect to liability based upon respondeat superior.

10
11 20-10-1920. Privileged communications.

12 (a)(1) The proceedings and records of peer review committees of
13 skilled nursing facilities shall not be subject to discovery or introduction
14 into evidence in any civil action against such skilled nursing facilities
15 arising out of the matters which are subject to evaluation and review by the
16 committee.

17 (2) No person who was in attendance at a meeting of the
18 committee shall be permitted or required to testify in any such civil action
19 as to any evidence or other matters produced or presented during the
20 proceedings of the committee or as to any findings, recommendations,
21 evaluations, opinions, or other actions of the committee or any members
22 thereof.

23 (3)(A) However, information, documents, or records otherwise
24 available from original sources are not to be construed as immune from
25 discovery or use in any such action merely because they were presented during
26 the proceedings of the committee. Nor shall any person who testifies before
27 the committee or who is a member of the committee be prevented from
28 testifying as to matters within his knowledge, but the witness shall not be
29 asked about his testimony before the committee or about opinions formed by
30 him as a result of the committee hearings.

31 (B) The submission of such peer review proceedings,
32 minutes, records, reports, and communications to a governing board shall not
33 operate as a waiver of the privilege.

34 (b)(1) The proceedings, minutes, records, or reports of organized
35 quality assurance committees of skilled nursing facilities having the
36 responsibility for reviewing and evaluating the quality of medical care at

1 skilled nursing facilities, and any records compiled or accumulated by the
2 administrative staff of such skilled nursing facilities in connection with
3 such review or evaluation, together with all communications or reports
4 originating in such committees, shall not be subject to discovery pursuant to
5 the Arkansas Rules of Civil Procedure or admissible in any legal proceeding
6 and shall be absolutely privileged communications.

7 (2)(A) The submission of such proceedings, minutes, records,
8 reports, and communications to a governing board shall not operate as a
9 waiver of the privilege.

10 (B) Neither shall testimony as to events occurring during
11 the activities of such committees be subject to discovery pursuant to the
12 Arkansas Rules of Civil Procedure.

13 (C) Nothing in this section shall be construed to prevent
14 disclosure of the data mentioned in subsection (b) of this section to
15 appropriate state or federal regulatory agencies which by statute or
16 regulation are entitled to access to such data, nor to governing boards.

17 (D) Further, nothing in this section shall be construed to
18 prevent discovery and admissibility if the legal action in which such data is
19 sought is brought by a skilled nursing facility which has been subjected to
20 censure or disciplinary action by a governing board.

21 (E) Nothing in this section shall be construed to apply to
22 original medical records, incident reports, or other reports with respect to
23 the care or treatment of any patient or to affect the discoverability or
24 admissibility of such records.

25
26 20-10-1921. Punitive damages.

27 (a) In any action for injury, if compensatory damages are awarded and
28 the claimant has made a demand for punitive damages, the fact finder shall
29 determine whether punitive damages should be awarded. The amount of any
30 award of punitive damages shall be determined by the circuit court.

31 (b) Punitive damages may be awarded against a skilled nursing facility
32 when the facility intentionally pursued a course of conduct for the purpose
33 of causing injury, and not otherwise. Liability for punitive damages must be
34 proved by clear and convincing evidence.

35 (c) An award of punitive damages against a skilled nursing facility
36 shall not exceed the lesser of three (3) times the award of compensatory

1 damages or one million dollars (\$1,000,000); provided, that if an award of
2 compensatory damages is twenty-five thousand dollars (\$25,000) or less, an
3 award of punitive damages shall not exceed seventy-five thousand dollars
4 (\$75,000).

5 (d) In any appeal of an award of punitive damages, the appellate court
6 shall review the evidence upon which the award is based de novo.

7
8 20-10-1922. Limitation on supersedeas.

9 In any appeal of a judgment of a circuit court against a skilled
10 nursing facility, the amount of a supersedeas bond or other security approved
11 by the court shall not exceed:

12 (a) One million dollars (\$1,000,000) in the case of a skilled nursing
13 facility which, together with its affiliates, had one hundred fifty (150) or
14 fewer occupied beds on the date of the judgment;

15 (b) Two million dollars (\$2,000,000) in the case of a skilled nursing
16 facility which, together with its affiliates, had more than one hundred fifty
17 (150) but four hundred (400) or fewer occupied beds on the date of the
18 judgment; or

19 (c) Five million dollars (\$5,000,000) in the case of a skilled nursing
20 facility which, together with its affiliates, had more than four hundred
21 (400) occupied beds on the date of the judgment.

22
23 SECTION 2. No provision of this act:

24 (a) Shall apply to, or alter existing law with respect to, any claim,
25 charge, action, or suit brought or prosecuted by the Attorney General; or

26 (b) Shall be construed to diminish or enlarge the powers or duties of
27 a coroner or medical examiner.

28
29 SECTION 3. EMERGENCY CLAUSE. It is found and determined by the
30 General Assembly of the State of Arkansas that adequate commercial insurance
31 coverage at affordable rates is not available for nursing homes in this
32 state; that lawsuits and claims which may become lawsuits threaten the
33 financial stability of nursing homes; that patients of nursing homes do not
34 have recourse to adequate sources of funds to redress legitimate claims for
35 personal injury; and that existing procedures are inadequate to protect the
36 interests of nursing homes and of those persons, primarily the elderly, who

1 are in need of long-term care. Therefore, an emergency is declared to exist
2 and this act being immediately necessary for the preservation of the public
3 peace, health, and safety shall become effective on:

4 (1) The date of its approval by the Governor;

5 (2) If the bill is neither approved nor vetoed by the Governor,
6 the expiration of the period of time during which the Governor may veto the
7 bill; or

8 (3) If the bill is vetoed by the Governor and the veto is
9 overridden, the date the last house overrides the veto.

10
11 */s/ Gillespie, et al*
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36